Supreme Court, U.S.
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No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION LOCAL #433 AND CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

PRELIMINARY MATTER 2

ARGUMENT 2

I. POST-BREACH OF CONTRACT HYPOTHETICAL ACTION CANNOT LIMIT A PLAINTIFFS' DAMAGE AND REMEDY CLAIMS 2

II. PETITIONERS PRESERVED THE ISSUE OF ATTORNEY FEES 5

III. THE ARGUMENTS AND ISSUES RAISED BY THE INTERVENORS ARE IRRELEVANT 7

CONCLUSION 8

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 6

Air Line Pilots Association International v. O'Neill, 111 S.Ct. 1127, 136 LLRM 2721 (1991) 2

Alier v. Tuscan Dairy Farms, Inc., 976 F.2nd 946 (2nd Cir. 1992) 2

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 90 L.Ed 650 (1945) 3

Cronin v. Sears Roebuck & Co., 588 F.2d 616 (8th Cir. 1978) 6

EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 6

Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982) 3

Int'l Union of Electrical, Radio and Machine Workers v. N.L.R.B., 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), *appeal on remand*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974) 3

Lewis v. Tuscan Dairy Farms, Inc., et al., 752 F.Supp. 116 (S.D.N.Y. 1990) 2

N.L.R.B. v. Aeronautical Industrial District Lodge No. 91, 934 F.2d 1288 (2nd Cir. 1991) 3

Richardson v. Communication Workers of America, 530 F.2d 126 (8th Cir. 1976) 6

U.S. v. Metropolitan St. Louis Sewer District, 952 F.2d 1040 (8th Cir. 1992) 7

STATEMENT OF THE CASE

The Respondents, from and after the Eighth Circuit's remand of this matter in 1987, have chosen to commingle Petitioners' claim for damages arising from the Union's failure to negotiate with the Petitioners' hybrid §301 claim. By so doing the Respondents have argued and the District Court and Eighth Circuit have accepted that the Petitioners' damage claims under their §301 action are measured by the "but for" rule and not pursuant to the existing collective bargaining agreement.

The Jury's Special Verdict dealt separately with both causes of action and specifically found, with regard to Petitioners' §301 claim, that Petitioners were wrongfully terminated by reason of Metz' breach of the collective bargaining agreement.

The Respondents suggest that simply because the jury found that the Petitioners were wrongfully terminated from their employment by reason of Metz' breach of the collective bargaining agreement that this did not resolve the issue of who would have ended up with the available jobs after negotiations. Initially, Petitioners point out that there were never any such negotiations. Second, the contract, as written, preserved Petitioners' jobs by reason of plantwide seniority. The Respondents defended the damage and remedy claims of the Petitioners by claiming that post-breach of contract hypothetical negotiations and a hypothetical ratification vote was a permissible basis upon which to determine that Plaintiffs' damages and remedies could be limited under their §301 claim. This is one of the issues presented by the Petitioners.

The Respondent Metz has, throughout the course of this litigation, referred to Interstate Brands Corporation's Omaha plant as a "failing company". No evidence has ever been adduced to support this claim and Metz' repeated restatement of this phrase does not make it so.

PRELIMINARY MATTER

In their Petition for Writ of Certiorari the Petitioners cited, at page 17, *Lewis v. Tuscan Dairy Farms, Inc., et al.*, 752 F.Supp. 116 (S.D.N.Y. 1990). This case was reversed on November 19, 1992 by the Second Circuit in *Alier v. Tuscan Dairy Farms, Inc.*, 976 F.2nd 946 (2nd Cir. 1992). The Second Circuit's Opinion, citing *Air Line Pilots Association International v. O'Neill*, 111 S.Ct. 1127, 136 LLRM 2721 (1991) remanded this action to the District Court to consider whether the Union had breached its duty of fair representation when considered in light of the "wide range of reasonableness" allowed to a Union, as set forth in *Air Line Pilots*.

ARGUMENT

I.

POST-BREACH OF CONTRACT HYPOTHETICAL ACTION CANNOT LIMIT A PLAINTIFFS' DAMAGE AND REMEDY CLAIMS.

The Respondents have cited numerous cases where a plaintiffs' damages have been established by a Court attempting to determine what would have occurred had a

company or a union not breached the collective bargaining agreement or a duty to fairly represent a plaintiff. These cases include *Int'l Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 426 F.2d 1243, 1252 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), *appeal on remand*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974), *N.L.R.B. v. Aeronautical Industrial District Lodge No. 91*, 934 F.2d 1288 (2nd Cir. 1991) and *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982) and others. The rationale of these cases is not supportive of the position of the Respondents. The underlying premise which allows a Court to attempt to determine what would have occurred but for the wrongful conduct of a Defendant is that the wrongdoer cannot benefit from its own wrongdoing. This is nothing more than an adaptation to the area of labor relations of the principle announced by this Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 90 L.Ed. 650 (1945), wherein this Court stated as follows:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. (Citations omitted). *Supra* at 265.

The actual argument of the Respondents, accepted by the District Court and the Eighth Circuit, is that the Respondents, having breached the collective bargaining agreement and the Union having breached its duty to fairly represent the Petitioners, can benefit by reason of that breach by arguing that had they not so breached the collective bargaining agreement, they could have negotiated an agreement which would have stripped the Petitioners of their established seniority rights. Distilled to its

most elemental terms, the legal argument presented and adopted by the lower courts in this action is that the "wrongdoers can benefit from their own wrongdoing".

If it were not enough that this legal principle has been turned on its head by the District Court and the Eighth Circuit, both of these Courts placed the burden upon the Plaintiffs to prove that hypothetical negotiations resulting in a hypothetical collective bargaining agreement hypothetically stripping Plaintiffs of their established seniority rights would not have been ratified by the appropriate Union membership.

The speculation engaged in by the District Court and the Eighth Circuit is simply not allowed in order to limit Petitioners' damage and remedy claims. To comprehend the extent of the speculation engaged in by the Lower Courts, Petitioners have appended to this Reply Brief as Appendix "N" one of the 79 identical affidavits submitted by the Respondents to the District Court and which the District Court and the Eighth Circuit found to be *competent* evidence.

In the purchase agreement between Metz and IBC, Metz agreed to assume IBC's duties under the IBC-Leavenworth Street labor contract which required that Metz was obligated to recognize the seniority of the Petitioners. The relevant provisions of this purchase agreement are set forth in the Eighth Circuit's first Opinion with regard to this matter (App. 40-42). The Special Verdict of the Jury specifically found that Metz was bound by this collective bargaining agreement and breached the agreement (App. 98-100). The By-Laws of the Union, in evidence at the trial of the remedy/damage portion of

this action, specifically provided that any modification of a collective bargaining agreement required an actual vote of the membership. This provision, Article XI., Section 2., is set forth in the Trial Court's Memorandum Opinion (App. 19). Metz independently agreed in its purchase agreement with IBC to honor Petitioners' seniority and it breached not only the purchase agreement but also the collective bargaining agreement when it failed to honor Petitioners' seniority. There having been no modification of the collective bargaining agreement, the speculation advanced by the Respondents and adopted by the Trial Court and the Eighth Circuit has allowed the Respondents to evade the obligations which they owe to the Petitioners under the Metz-IBC purchase agreement, the collective bargaining agreement and the By-Laws of the Respondent Union.

II.

PETITIONERS PRESERVED THE ISSUE OF ATTORNEY FEES.

The Respondents suggest that Petitioners did not properly preserve the issue of the failure of the District Court to award attorney fees. Respondents have pointed out that Petitioners did not argue to the Eighth Circuit that attorney fees should be awarded as a part of their compensatory damage claim. While this is true, the Petitioners did raise the issue of the failure of the Trial Court to award attorney fees. This is the issue before this Court. Attorney fees could only have been awarded either as part of compensatory damages or under the "bad faith" exception of the American rule. The identical argument

made to this Court was not made to the Eighth Circuit because the Eighth Circuit had long ago determined that attorney fees, in hybrid §301 actions, were not properly a part of a Plaintiffs' compensatory damage claim. *Cronin v. Sears Roebuck & Co.*, 588 F.2d 616, 619 (8th Cir. 1978) and *Richardson v. Communication Workers of America*, 530 F.2d 126, 132 (8th Cir. 1976).

The issue raised in the Eighth Circuit was as follows:

V.

WHETHER THE DISTRICT COURT ERRED IN FAILING TO AWARD PLAINTIFFS ATTORNEY FEES.

Additionally, Petitioners further raised in the Eighth Circuit the following issue:

X.

WHETHER THE DISTRICT COURT ERRED IN ITS METHOD OF COMPUTATION OF DAMAGES AND THE REMEDY DUE PLAINTIFFS.

There is no requirement that the identical argument made before a lower court be presented to this Court. The cases cited by the Respondents, *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2, 26 L.Ed.2d 142, 138 n.2 (1970) and *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) only relate to "issues" presented, not the argument made.

If, in fact, "exceptional circumstances" are required to be shown in order for this issue to again be raised in this Court then Petitioners suggest that the Eighth Circuit's long-standing rule against allowing attorney fees as part of compensatory damages in hybrid §301 actions is a sufficient "exceptional circumstance" which would allow

this Court to consider this issue if, in fact, Petitioners have not adequately preserved this issue by the nature of the arguments submitted to the Eight Circuit.

III.

THE ARGUMENTS AND ISSUES RAISED BY THE INTERVENORS ARE IRRELEVANT

The Intervenors have argued that the severance pay arbitration bars the Petitioners' claims herein. The Intervenors' position was rejected by the Trial Court. While Metz and the Union also raised these identical issues, only the Intervenors Cross-Appealed to the Eighth Circuit with regard to these issues. The Eighth Circuit never addressed these issues as raised by the Intervenors and they are not relevant with regard to Petitioners' Petition for a Writ of Certiorari since, at most, this would require a remand to the Eighth Circuit to consider these issues, if required.

The Eighth Circuit would never be required to consider these issues since the severance pay issues could only be raised by either Metz or the Union and the Intervenors had no standing to raise or assert issues on behalf of another party unless that party was unable to assert its own rights, a condition which is nonexistent with regard to this action. See *U.S. v. Metropolitan St. Louis Sewer District*, 952 F.2d 1040, 1043 (8th Cir. 1992).

CONCLUSION

The issues presented by the Petitioners' Petition for Writ of Certiorari to the Eighth Circuit are fully presented to this Court by reason of the nature of the submissions of all parties to this action. The issues presented by the Petitioners are essentially legal issues. While the issue presented with regard to the failure of the Trial Court to award interest is normally fact intensive, the failure of the Trial Court to enunciate any basis justifying the denial of interest presents the legal issue as to whether or not the Trial Court is required to so do in order to deny the award of interest.

The Petitioners renew their request that this Court order a summary disposition of this matter on the merits and direct the Eighth Circuit to remand this matter to the Trial Court with specific instructions that Petitioners' remedy and damage claims be measured by the collective bargaining agreement in existence; that attorney fees be awarded as part of Petitioners' compensatory damage claim; and, that interest be awarded absent any adequate justification for its denial.

Respectfully submitted,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX OF PETITIONERS

Appendix Table of Contents

N. Affidavit of William T. Adams.....App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SELMAN (JOE) THOMAS, JR., et al.,	)	CIVIL NO. 83-0-652
Plaintiffs,	)	AFFIDAVIT OF WILLIAM T. ADAMS
vs.	)	
BAKERY, CONFECTIONERY AND TOBACCO WORKERS, UNION LOCAL #433, et al.,	)	
Defendants.	)	

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS)

COMES NOW the Affiant, William T. Adams, and for his Affidavit in this matter, states under oath as follows:

1. That he was a full-time or part-time worker for Metz Baking Company ("Metz") in Omaha, Nebraska, in February and March of 1983;

2. That he was at that time a member of Union Local No. 433 of the Bakery, Confectionery and Tobacco Workers (the "Union") and he was covered by the Collective Bargaining Agreement between Metz and the Union;

3. That immediately prior to the time Metz acquired the assets of IBC in Omaha, Nebraska in February, 1983 he was working for Metz in Omaha, Nebraska and he was not employed at that time by Interstate Brands Corporation (IBC);

4. That he would have been eligible to vote in February or March of 1983 on the subject of combining the work forces of Metz and the former IBC workers in Omaha, Nebraska.

5. That he is aware that at the time IBC was acquired, the former IBC workers became "new hires" of Metz, and they were "end-tailed" or placed at the bottom of the seniority list with respect to the existing Metz work force in Omaha, Nebraska. He further states that if he had been given an opportunity to vote on the subject at that time he would have been present at any such vote and he would have voted to end-tail the former IBC workers just as Metz in fact did. He further specifically states that he would have voted against dove-tailing or any other method of combining the two work forces other than end-tailing;

6. That he further states at the time this occurred he was aware of the attitude and belief of the Metz workers in Omaha, Nebraska, and based upon his contacts with them it is his opinion that the Metz workers believed end-tailing the former IBC workers was the only proper solution and the Metz workers would have voted as a group in favor of end-tailing the former IBC workers.

FURTHER AFFIANT SAYETH NAUGHT.

DATED THIS 12 day of October, 1989.

/s/ William T. Adams
William T. Adams

SUBSCRIBED AND SWORN to before me this 12 day of October, 1989.

/s/ Kathleen E. Muldoon
Notary Public

GENERAL NOTARY – State of Nebraska
KATHLEEN E. MULDOON
My Comm. Exp. Jan. 30, 1992